76-1600

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1600

LOUIS P. BERGNA, District Attorney, Santa Clara County, California, and CRAIG BROWN, Deputy District Attorney,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners, Louis P. Bergna, District Attorney, Santa Clara County, California, and Craig Brown, his deputy,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 2, 1977.

[1]A separate petition for writ of certiorari was filed in this Court on April 26, 1977 on behalf of James Zurcher, Chief of Police, Palo Alto, California, and Palo Alto Policemen Jimmie Bonander, Paul Deisenger, Donald Martin and Richard Peardon.

OPINION BELOW

The opinion of the Court of Appeals reported at 550 F.2d 464, is attached as Appendix A; an opinion of the District Court adopted by the Court of Appeals and reported at 353 F.Supp. 124 is attached as Appendix C.[2]

JURISDICTION

The Court of Appeals' order denying the petitions for rehearing and rejecting the suggestions for rehearing in banc, attached as Appendix B, was filed on March 28, 1977. This petition is timely filed within 90 days of that date (28 U.S.C. section 2101(c)).

This Court's jurisdiction is invoked under Title 28, United States Code section 1254(1).[3] The District Court's jurisdiction was invoked under Title 28, United States Code section 1343(3).

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in holding that a search warrant violated the Fourth Amendment solely because the affidavit did not estab-

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[2]Two other opinions of the District Court not adopted by the Court of Appeals and reported at 366 F.Supp. 18 and 64 F.R.D. 680 are attached as Appendices D and E respectively.

[3]The Court of Appeals' holding would, we submit, effectively invalidate, California Penal Code section 1524, and would normally have provided basis for appellate jurisdiction under 28 U.S.C. section 1254(2). See Argument I.C. page 16, *infra*. Appellate jurisdiction is not clear, however, because the District Court and the Court of Appeals ignored requests to consider section 1524 and did not expressly invalidate the statute in their opinions. See *Minnesota v. Alexander*, ___ U.S. ___ (1977), 45 L.W. 3706 n.1, *Stevens*, J. dissenting.

lish probable cause to believe that the occupant of the premises to be searched either participated in the crime or would not honor a subpoena duces tecum?

2. Does Public Law 94-559 [attorneys' fees statute] abrogate the absolute immunity from monetary penalties granted to judges and prosecutors, and, in any event, would retroactive application be manifestly unjust and result in a deprivation of due process?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides in part:

> ". . . and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Civil Rights Act of 1871, 42 USC, Sec. 1983, provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976), provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections . . . 1979 [42 USC Sec. 1983]

> . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fee as part of the cost."

4. Section 1524 of the Penal Code of the State of California provides in pertinent part:

> "A search warrant may be issued upon any of the following grounds:
>
> . . .
>
> 4. When the property or things to be seized consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.
>
> The property or things described in this section may be taken on the warrant from any place, or from *any person* in whose possession it may be." (Emphasis added).

STATEMENT OF THE CASE

On May 13, 1971, the Stanford Daily of Palo Alto, California, a student newspaper, and seven members of the Daily's staff filed a complaint in the United States District Court for the Northern District of California. The complaint, pursuant to Title 42, United States Code section 1983, sought declaratory relief, a permanent injunction, and attorneys' fees. As defendants, the complaint named J. Barton Phelps, Judge of the Municipal Court for the Palo Alto-Mountain View Judicial District; Louis P. Bergna, District Attorney of Santa Clara County; Craig Brown, a deputy district attorney; James Zur-

cher, Chief of Police for the City of Palo Alto; and Palo Alto Police Officers Jimmie Bonander, Paul Deisenger, Donald Martin, and Richard Peardon.

On October 5, 1972, without permitting depositions previously noticed by defendants, the District Court issued its memorandum and order purportedly granting summary judgment. Declaratory relief only was granted, the court stating an anticipation "that [the] decision [would] be honored and that an injunction [would be] unnecessary."

At plaintiffs' instance, the action against Judge Phelps was dismissed on December 15, 1972.

By memorandum and order of August 10, 1973 (Appendix D) the District Court granted attorneys' fees, and by memorandum and order of July 19, 1973 (Appendix E) these fees were fixed at $47,500. Judgment was entered July 23, 1974 (Appendix F) and notice of appeal was filed August 21, 1974.

The Court of Appeals filed its opinion on February 2, 1977 (Appendix A) adopting the District Court's opinion of October 5, 1972 (Appendix C), and sustaining the attorneys' fees award but on a different ground than that relied on by the District Court. Petitions for rehearing and suggestions for rehearing in banc were denied and rejected on March 28, 1977. The mandate of the Court of Appeals has been stayed pending certiorari.

STATEMENT OF FACTS

On Friday, April 9, 1971, members of the Palo Alto Police Department were called to the Stanford

University Hospital to remove a large group of demonstrators. After several unsuccessful attempts to persuade the demonstrators to leave peacefully, the officers forced their way through the demonstrators' barricade and into the offices of the hospital. While the main police advance was proceeding on the west side of the building, unknown persons armed with chair legs and other weapons attacked nine officers stationed on the east side. One of the nine officers was knocked to the floor and struck repeatedly on the head; another officer was struck with a heavy metal object and lost consciousness. Each of the other seven officers was also injured.

No police photographer was located at the east end of the hospital and most news photographers were located at the west end, the site of the main resistance. On Sunday, April 11, however, photographs appearing in a special edition of the Stanford Daily indicated that the Daily's photographer had been in a position where he could have photographed the assaults on the officers. Officer Peardon, one of the officers who had been assaulted, obtained a copy of the special edition and on Monday, April 12, with the assistance of Deputy District Attorney Brown, he prepared a search warrant affidavit. The affidavit described the assaults and the important aspects of the photographs published in the Daily's special edition.[4]

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[4]Though not mentioned in the affidavit, Brown had specific reasons, later disclosed in an affidavit opposing summary judgment, for recommending a search warrant rather than a subpoena duces tecum. First, almost all felony prosecutions in California

Judge Phelps issued a warrant commanding any peace officer in the county to search the premises of the Daily for photographs of the April 9 demonstration, negatives of the photographs and any film used in taking the photographs. The defendant officers executed the warrant, searching desk tops, table tops, unlocked drawers, and other relatively open areas, glancing at materials to determine whether there were pictures, films or negatives concealed among them, but not reading in whole or in part any written material. The entire search lasted about fifteen minutes.[5] Of the materials described in the warrant, only

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are necessarily (see n.6, *infra*) prosecuted by the complaint-information procedure, and under that procedure no subpoena may issue until a defendant has been identified and a prosecution initiated. (Calif. Pen. Code sections 1326-1327). Second, in a 1969 proceeding that arose out of another demonstration, Brown had sought to obtain photographic evidence from the Daily by means of a subpoena duces tecum. Two staff members gave testimony to the effect that evidence sought by the subpoena had been either misplaced or stolen. Brown examined "contact sheets" produced by the Daily and concluded "that the contact sheets and/or the films from which they had been produced were incomplete and that a number of photographs, in [Brown's] opinion those which would have been incriminating, had been deleted." Third, in policy statements published prior to April 1971, the Daily stated that it felt "no obligation to help in the prosecution of students for crimes related to political activity" and that "negatives which [could] be used to convict protestors [would] be destroyed." (An affidavit of a staff member filed in support of plaintiffs' motion for summary judgment asserted that the Daily's policy of evidence destruction did not apply to material covered by a subpoena; this qualification of the policy had not been contained anywhere in the published statement.) For these reasons, Brown was of the opinion that speedy action was required to avoid destruction of evidence and that such action could only be accomplished by means of a search warrant.

[5]The length of the search and whether material was read were disputed but as the district court's ruling was made on plaintiffs' motion for summary judgment presumably these factual disputes were resolved in defendants' favor. See 6 *Moore's Federal Practice*, 56.27[1].

the published photographs were found; nothing was seized.

REASONS FOR GRANTING THE WRIT

1. This Court should grant the writ to review a ruling that would work a drastic change in the traditional, nationwide practice of issuing search warrants on probable cause to believe that seizable items are in a particular place. The Ninth Circuit added to the Fourth Amendment's requirements, holding that "law enforcement agencies cannot obtain a warrant to conduct a third party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical." Appendix C, p. 26. A "third party" means, a "nonsuspect" and apparently, under the court's reasoning, *every person* is presumed to be a nonsuspect unless the warrant application shows probable cause to believe that the person has participated in the crime to which the search relates. Thus, *every search warrant application* would be required to meet the new additional requirement of showing that the occupant of the target premises is a suspect, i.e., that probable cause exists to believe that the occupant participated in the crime to which the search relates, or, if that showing is not possible, then that there is probable cause to believe that the materials may be destroyed or that a subpoena is otherwise impractical.[6]

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[6]The Ninth Circuit ruled that Brown's information regarding the Daily's policy of evidence destruction could not be considered as a showing of subpoena impracticality because the in-

The Ninth Circuit's unprecedented holding would strike a massive blow against the public interest in fair and effective law enforcement. The search warrant is a basic investigative tool, crucial to that public interest. Abuse of this tool by law enforcement officials has always been amply protected against by the traditional requirements of particularity, probable cause to believe seizable items are in a particular place, and, most of all, review by a neutral and detached magistrate. The Ninth Circuit would add to these traditional requirements, invalidate substantial numbers of federal and state warrants, and cripple the search warrant as an investigative tool.

The subpoena requirement would expose evidence to an additional danger of destruction or concealment, and would lessen the warrant procedure's protections of particularity, prior judicial review and insulation from criminal reprisal. The requirement raises Fifth Amendment problems and would irreparably slow police investigations.

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formation had not been contained "within the four corners of the affidavits." But the Court then said that even had this information been set forth in the affidavit it would have been insufficient. This sets extremely stringent requirements for the showing of subpoena impracticality. See Appendix C, p. 33 n.16 and pp. 27-28.

The Ninth Circuit also brushed aside the suggestion in Brown's affidavit that a subpoena duces tecum was impractical as a matter of California law by commenting that the county grand jury, a body authorized to issue subpoenas, had met shortly after the search. This comment fails to recognize that, with exceptions not here pertinent, California law authorizes only one grand jury per county and requires that grand jury to spend a majority of its time on civil matters. Little time is left for criminal matters. Thus, in 1972 only 3.8 percent of California felony prosecutions were initiated by way of the grand jury. 1974 California Judicial Council, Report, p. 30.

2. This Court should grant the writ to review an interpretation of Public Law No. 94-559 which would permit abrogation of the absolute immunity from monetary penalties of judges and prosecutors through the imposition of attorneys' fees and which, in addition, would permit a manifestly unjust retroactive application of the statute.

District Attorney Bergna and Deputy District Attorney Brown are faced with personal liability for attorneys' fees in the amount of $47,500. This liability would also have attached to Judge Phelps had not plaintiffs taken it upon themselves to obtain the judge's dismissal as a defendant. In view of the fact that the amount of $47,500 was set in a case which not only did not go to trial but never even proceeded to formal discovery the potential size of attorneys' fees awards against judges and prosecutors must be termed astounding.

The threat of such liability would obviously inhibit judges and prosecutors in the performance of their judicial functions. Furthermore, the retroactive liability imposed by the Ninth Circuit is manifestly unjust. When these defendants acted in 1971 they could not have known that five years later Congress would provide such a penalty for their actions.

ARGUMENT

I

THE TRADITIONAL REQUIREMENT THAT SEARCH WARRANTS ISSUE ONLY ON PROBABLE CAUSE TO BELIEVE SEIZABLE ITEMS ARE IN A PARTICULAR PLACE SHOULD NOT BE ENCUMBERED BY AN ADDITIONAL REQUIREMENT OF PROBABLE CAUSE TO BELIEVE THAT THE OCCUPANT PARTICIPATED IN THE CRIME OR THAT HE WILL NOT HONOR A SUBPOENA DUCES TECUM.

The Ninth Circuit's startling holding which could force drastic changes in traditional search warrant practice, was rendered despite the ample protections afforded by established law, despite the potentially serious harm to the public interest in fair and effective law enforcement,[1] and despite principles of comity

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[1]Our argument here centers on the broad holding covering all "nonsuspect" searches. We note, however, that while the Ninth Circuit treats the broad holding as dispositive, the Court also sets out a second ruling applicable to searches of newspapers: "A search warrant should be permitted only in the rare circumstance where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order would be futile." Appendix C, p. 33. Court's own emphasis.

The Ninth Circuit relied primarily on *Branzburg v. Hayes*, 408 U.S. 665 (1972), but that case held that when weighed against the public interest in fair and effective law enforcement, the First Amendment considerations entailed in newsgathering did not relieve a reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to a criminal investigation. Moreover, this Court said: "insofar as any reporter in these cases undertook not to reveal information or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question." 408 U.S. at 692. Our search warrant was based on probable cause to believe that the Daily possessed photographs of persons engaging in the commission of serious, violent felonies. There is no basis for any special First Amendment claim of privilege as to this type of evidence. Furthermore, the dangers which the Ninth Circuit indicates are present in newspaper searches may be avoided by the particularity requirement which, under California cases as well as under cases of the United States Supreme

that called for a fair consideration of California's scheme of laws.

A. There Is No Legal Precedent For The Ninth Circuit's Additional Requirements.

The Fourth Amendment provides that ". . . no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The term "probable cause" has always been interpreted to mean cause to believe only that "the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched." Comment, 28 U.Chi.L.Rev. 664, 687 (1961).

Our research has failed to discover a single jurisdiction, state or federal, interpreting "probable cause" as also entailing cause to believe that the occupant either participated in the crime or will not honor a subpoena. The rule has always been that the affidavit "need not identify the person in charge of the prem-

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Court, is enforced more strictly where literary materials are the objects of the search. *See Aday v. Superior Court*, 55 Cal.2d 789, 797-98, 13 Cal.Rptr. 415, 420 (1961); Witkin, *California Evidence*, 2d ed., section 132. *See also Stanford v. Texas*, 379 U.S. 476 (1965).

The Ninth Circuit also relies in part on claims made in affidavits submitted by plaintiffs. *See, e.g.*, Appendix C, pp. 34-35. Defendants' attempt to depose plaintiffs concerning these claims was cut off by the District Court's grant of summary judgment. We would submit that at least to some extent, the First Amendment claims presented triable issues of fact (*see Branzburg v. Hayes, supra*, 408 U.S. at 693) and that to this extent it was improper for the District Court to rely on those claims or to grant summary judgment.

ises or name the person in possession or any other person as the offender." LaFave, "Search and Seizure: 'The Course of True Law . . . Has Not Run . . . Smooth.'" U.Ill.L.F. 255, 261 (1966).[8]

Of course, the probable cause requirement is not the end of the Fourth Amendment's protections. The Amendment also requires that "the goods to be seized . . . be described with such certainty that they may be identified and with such particularity that the officer charged with the execution of the warrant will be left with no discretion respecting the property to be taken." LaFave, Op. cit. at 268. *See Andresen v. Maryland,* 427 U.S. 463, 480 (1976). Likewise, the description of the place to be searched must be sufficiently definite as to preclude an officer from "exercising a selective discretion in determining where he will search." 68 *American Jurisprudence,* 2d, Search and Seizure, section 74. And, most importantly of all, the Amendment interposes, between the citizen and the police, a neutral and detached magistrate, to pass on whether the requirements of probable cause and particularly are met. *See Warden v. Hayden,* 387 U.S. 294, 301 (1967).

It is this ordered scheme which the Ninth Circuit would drastically amend, overlooking the fact that

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[8]See also Federal Rules of Criminal Procedure, Rule 41; California Penal Code sections 1528, 1529; N. Y. Crim. Proc. Law sections 690.15, 690.35(2), 690.40(2); *Williams v. Justice Court,* 230 Cal.App.2d 82, 100-101, 40 Cal.Rptr. 724 (1964); *Hanger v. United States,* 398 F.2d 91 (8th Cir. 1968); *Samuel v. State,* 222 So.2d 3 (Fla. 1969); *Williams v. State,* 240 P.2d 1132 (Okla. 1952); *Garner v. State,* 423 S.W.2d 480 (Tenn. 1968); 68 *American Jurisprudence 2d,* Searches and Seizures, section 79.

the established protections have always been considered ample and also ignoring the fact, as we discuss below, that these drastic changes do great harm to the public's interest in fair and effective law enforcement.[9]

B. The District Court's Holding Would Harm The Public's Interest In Fair and Effective Law Enforcement and Sometimes Even Diminish Present Protections To The Individual.

It has always been recognized that once the Fourth Amendment's "established requirements have been met, the public right is paramount." *White v. United States*, 346 F.2d 800, 803 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 1014.

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[9]The Ninth Circuit reasoned: (1) *Owens v. Way*, 141 Ga. 796, 82 S.E. 132 (Ga. Sup. Ct. 1914) and *Commodity Mfg. Co. v. Moore*, 198 N.Y.S. 45 (Supp. 1923) "indicate that search of a third party even with a warrant will not satisfy the requirements of the Fourth Amendment"; (2) in situations involving non-suspects, warrants are unnecessary because of the availability of "less drastic means"; (3) as a historical matter the notion of search warrants has involved only those suspected of crime; (4) *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971) "would seem to compel" the holding; and (5) the exclusionary rule is not available to third parties.

None of these reasons has validity: (1) *Owens* refers to an arrest warrant rather than a search warrant (82 S.E. at 133); the language relied on from *Commodity*, while referring to a search warrant, is dictum (198 N.Y.S. at 47); and the property rationale of these cases is no longer applicable (*Warden v. Hayden*, 397 U.S. 294 (1967)); (2) the subpoena alternative advanced as a "less drastic means" will not achieve the same ends as a warrant; (see Argument I.B. *infra*); (3) the statement that search warrants have historically been used only against suspects is simply in error; see Argument I.A., *supra;* (4) the *Bacon* case dealt only with statutory rules applicable to arrest warrants for material witnesses; see 449 F.2d at 943; (5) California has a "vicarious exclusionary rule" permitting a defendant to challenge evidence obtained from the search of a third party, including a non-suspect and, thus deterring improper third party searches (*Kaplan v. Superior Court*, 6 Cal.3d 150, 98 Cal.Rptr. 649 (1971)).

> "This Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course . . . [T]he officers in this case did what the constitution requires. They obtained a warrant from a judicial officer 'upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the . . . things to be seized.' It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community." *United States v. Ventresca,* 380 U.S. 102, 111-112 (1965).

This Court has noted that the search warrant serves "a highly important governmental need; *e.g.,* the apprehension and conviction of criminals." *Fuentes v. Shevin,* 407 U.S. 67, 93 n.30 (1972). The Ninth Circuit's decision will not only lessen the chances of meeting this need, it will sometimes even diminish present protections to the individual.

First, there will be many instances where, though probable cause to arrest cannot be shown, the apparent non-suspect is in fact the criminal. "The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice." *Fuentes* at 93 n.30. Second, a neutral person put under the subpoena's lawful command to produce evidence may simultaneously face the criminal's unlawful command to dispose of the evidence. Execution of a warrant avoids placing the neutral in this uncomfortable position. Third, the warrant must pass a prior judicial review whereas the subpoena may

produce compliance without the person realizing that judicial review is available. Fourth, the warrant must specify location with particularity. There is no such subpoena requirement. Fifth, the warrant does not raise the Fifth Amendment concerns generated by the subpoena because "the individual against whom the search is directed is not required to aid in the discovery, production or authentication of incriminating evidence." *Andresen v. Maryland*, 427 U.S. 463, 474 (1976). Finally, ". . . a search warrant is generally issued in situations demanding prompt action." *Fuentes* at 93 n.30. The notice requirements in enforcing subpoenas would slow investigations immensely.

There was no seizure of any kind in this case but where in the rare case a search might interfere with First Amendment functions, perhaps the Ninth Circuit's goals could be achieved by ordering a prompt judicial adversary hearing after any such seizure. Compare *U.S. v. 37 Photographs*, 402 U.S. 363 (1971). We note, however, that such a procedure would apply in all search cases involving First Amendment considerations and not just in "non-suspect" cases.

C. The Lower Court's Failure to Consider California's Scheme of Laws Violated Principles of Comity.

The issuance of search warrants directed against premises of non-suspects has long been authorized by California Penal Code section 1524.[10] The rule em-

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[10]The history of section 1524 makes it clear that it is intended to authorize searches of any and all premises on probable cause even though the premises are those of a "third-party non-suspect."

bodied in section 1524 is, however, a part of a system of search and seizure rules that provides sound protections for individual rights.[11] These protections were never considered by the Ninth Circuit. California Penal Code section 1524 was forcefully called to the Court of Appeals' attention, yet nowhere in its opinion did the Ninth Circuit mention the statute that was being invalidated. This refusal to discuss California law is a clear violation of the spirit of comity which entails "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National

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See for example 32 Cal. State Bar Jour. 615, 616 (1957); Calif. Stats. 1899, c. 72, p. 87, section 1; Calif. Stats. 1957, c. 1884, p. 3289, section 1. Moreover, the California Legislature recently affirmed the use of search warrants for premises of financial institutions—which, of course may be considered as falling under the "non-suspect" label. *See* Calif. Gov. Code sections 7470(a)(3), 7475; "California Right To Financial Privacy Act" Calif. Stats. 1976, c. 1320.

Failure to give notice to the California Attorney General as required by former sections 2281 and 2284 of Title 28 of the United States Code constitutes a significant defect in the proceedings. Although the Attorney General appeared as *amicus curiae* in the Court of Appeals and later entered as counsel for the District Attorney, the Chief Law Officer of the State should have had opportunity to participate fully in proceedings which led to section 1524 being effectively invalidated.

[11]The California provisions against unreasonable searches and seizures are in many respects more protective than those afforded by the federal system. California for example, prohibits full field searches on traffic arrests (*People v. Brisendine*, 13 Cal.3d 528, 546, 119 Cal.Rptr. 315, 326 (1975); contrast *United States v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973)); prohibits routine inventory of impounded autos (*Mozzetti v. Superior Court*, 4 Cal.3d 699, 94 Cal.Rptr. 412 (1971); contrast *South Dakota v. Opperman*, 428 U.S. 364 (1973)) and follows the vicarious exclusionary rule (*Kaplan v. Superior Court*, 6 Cal.3d 150, 98 Cal.Rptr. 649 (1971); contrast *Jones v. United States*, 362 U.S. 257, 261 (1960)). See also Witkin, *California Evidence*, 2d ed., sections 124-125, 129-132.

Government will fare best if the State and these institutions are left free to perform their separate functions in their separate ways." *See Younger v. Harris,* 401 U.S. 37, 44 (1971). *See also Stone v. Powell,* 428 U.S. 465, 491 n.31 (1976); *Schneckloth v. Bustamonte,* 412 U.S. 218, 259 (1973), Powell, J. concurring.

Because the Ninth Circuit gave no consideration to California's scheme of laws, the state is now faced with a frankly experimental ruling that would require major adjustments in its administration of the criminal law. Such experiments, we submit, should be confined to federal enclaves. *Compare Stone v. Powell, supra; Schneckloth v. Bustamonte, supra; U. S. ex rel. Lawrence v. Woods,* 432 F.2d 1072, 1075-1076 (7th Cir. 1970).

II

THE AWARD OF ATTORNEYS' FEES VIOLATES THE ABSOLUTE IMMUNITY FROM MONETARY PENALTIES GRANTED TO JUDGES, PROSECUTORS AND THOSE WHO CARRY OUT JUDICIAL ORDERS.

The Ninth Circuit acknowledged that *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240 (1975) "destroyed the legal foundation for [plaintiffs'] fee award." Appendix A, p. 4. Nonetheless, the Circuit Court applied the provisions of Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976), which states, *inter alia:*

> "In any action or proceeding to enforce a provision of sections . . . 1979 [42 U.S.C. § 1983]

> . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fee as part of the cost."

This statute cannot be applied to this case without abrogating the absolute immunity from monetary penalties afforded to judges, prosecutors and those who carry out judicial orders.

There is little doubt that the magistrate who issued the warrant was the prime actor and therefore the responsible party in this lawsuit. But for his act of signing the warrant, the basis for the instant case would never have existed. If the attorneys' fees statute is to apply to anyone, it must apply to the magistrate who by his act sanctioned what the Ninth Circuit concluded was an invasion of the plaintiffs' constitutional rights. Consequently, though the magistrate was dismissed as a party at plaintiffs' instance, this Court should recognize that denying the petition for certiorari would acknowledge a decision that attorneys' fees can be awarded against a prosecutor for essentially a judicial act, and would inevitably lead to the imposition of attorneys' fees against a magistrate or any judge named in an injunctive action or one merely seeking declaratory relief.

In order to preserve the independence of the judiciary, the absolute immunity shielding judges from the imposition of monetary penalties compels the conclusion that judges cannot be personally liable for the imposition of attorneys' fees. *See Pierson v. Ray*, 386 U.S. 547 (1967). Therefore, it is also evident

that the absolute immunity granted to prosecutors from monetary penalties by this Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976) should not be destroyed by the imposition of attorneys' fees.[12] In *Imbler*, this Court denied $2.7 million in actual and exemplary charges and $15,000 attorney's fees, concluding that the prosecutor enjoys "the same absolute immunity under section 1983 that the prosecutor enjoys at common law" (424 U.S. at 427), and noted that any less protection would undermine the public trust of the prosecutor's office because:

> ". . . suits could be expected with some frequency, for a defendant will often transform his resentment at being prosecuted into the ascription of improper and malicious actions to the state's advocate. (Citations omitted). Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted

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[12]Petitioners recognize that the Report of the House of Representatives Committee on the Judiciary, H.R. Rep. No. 94-1588, 94th Congress, 2nd Session, September 15, 1976, at 7 and the Report of the Senate Judiciary Committee, No. 94-1011, June 29, 1976 at 5 indicate that attorneys' fees awarded to a prevailing party under the statute can be paid from the state or local treasuries. This conclusion totally ignores the fact that there is *no* " 'threshold . . . congressional authorization' " which allows a section 1983 suit to be brought against a state or local entity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976). That is, the statute does not attempt to amend the language of section 1983 and legislatively overrule this Court's decision that state and local governmental entities are not "persons" within the meaning of section 1983. *Monroe v. Pape*, 365 U.S. 167 (1961); *Moor v. Alameda*, 411 U.S. 693 (1973). Some members of Congress are apparently aware of this limitation in Public Law No. 94-559. Recently introduced legislation would amend Title 42, United States Code section 1983 and specifically include units of government within the definition of "person." H.R. 4514, introduced March 4, 1977.

> from the pressing duty of enforcing the criminal law." 424 U.S. at 425.

Precisely the same rationale precludes the award of attorneys' fees in this case. The constant threat of personal financial liability for attorneys' fees is just as inhibiting as the possibility of a damage award. Labelling the financial imposition "award of attorneys' fees" does not alter either the reality or the burden. In each case, the prosecutor is subject to substantial pecuniary liability which will detrimentally affect the decision-making process. No clearer case is presented than the instant one, where over $47,000 in attorneys' fees was awarded, though the case never went to trial and no formal discovery commenced.[13]

In any event, were this Court to agree that Congress has voided the unconditional immunity from monetary penalties granted judges and prosecutors, Public Law No. 94-559 must not be applied retroactively. The following factors must be considered: The nature and identity of the parties, the value of their rights, and the nature of the impact of the change in law upon those rights. *Bradley v. The School Board of the City of Richmond,* 416 U.S. 696, 717-718 (1974). All these factors apply. Obviously, the impact of personal liability for attorneys' fees will have a disastrous effect on the absolute immunity

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[13]In another case from the same District, other plaintiffs are seeking $263,000.00 for "reasonable attorney and related expenditures" in obtaining a summary judgment. *Wright, et al. v. Enomoto,* C-73-1422 SAW (summary judgment stayed by order of this Court in No. A-301).

conferred upon judges and prosecutors. Consequently, *Bradley* compels the conclusion that Public Law No. 94-559 cannot be applied retroactively against judges and prosecutors.

Finally, retroactive abrogation of a judge's and a prosecutor's absolute immunity violates their right to due process. No notice has been afforded them that decisions made years ago can now be the basis for personal financial liability by the device of compelling them to finance the litigation brought against them in the performance of their official duties.[14]

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[14]Petitioners also note that there is authority for the proposition that judges are immune from any declaratory or injunctive relief. *Atchley v. Greenhill*, 373 F.Supp. 512, 514 (S.D. Tex. 1974), *affirmed*, 517 F.2d 692, *cert. denied*, 424 U.S. 915. *See also, Hill v. McClennan*, 490 F.2d 859 (5th Cir. 1974); *Mirin v. Justices of Supreme Court of Nevada*, 415 F.Supp. 1178, 1192 (D. Nev. 1976). *Contra, United States v. McLeod*, 385 F.2d 734 (5th Cir. 1974). In light of this authority, petitioners urge this Court to review the question of whether prosecutors who act in good faith should be granted a qualified immunity against injunctive and declaratory relief.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

Dated, San Francisco, California,
May 11, 1977.

Respectfully submitted,

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(Appendices Follow)